SUPREME COURT, U. S.

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in the

Supreme Court

of the

United States

OCTOBER TERM, [redacted] 1970

No. 668

SAM NICK FARINELLA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	3
CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS INVOLVED	4
STATEMENT OF THE CASE	6
FEDERAL JURISDICTION	7
ARGUMENT	7
REASONS FOR GRANTING THE WRIT	7
I	7
II	9
CONCLUSION	11
CERTIFICATE OF SERVICE	12

INDEX TO APPENDIX

	Page
Indictment Counts II and III	Appendix A
Judgment and Commitment	Appendix B
Opinion of United States Court of Appeals, Fifth Circuit	Appendix C
Petition for Rehearing	Appendix D
Denial of Petition for Rehearing	Appendix E
Opinion of United States Court of Appeals, Fifth Circuit, July 7, 1970	Appendix F
Denial of Petition for Rehearing	Appendix G

TABLE OF AUTHORITIES

	Page
Hamilton v. U. S., 140 F.2d 679	9
U. S. v. Johnson, 142 F.2d 588, cert dismissed 323 U.S. 806, 89 L.Ed. 643	9

OTHER AUTHORITIES

Title 28 U.S.C. Section 1254(1)	2, 4
Rule 19(1)(b) Rules of the Supreme Court of the United States	2, 4
18 U.S.C.A. 1951 (a) (b)	4
Rule 16 Federal Rules of Criminal Procedure	9
Rule 33 Federal Rules of Criminal Procedure	6
Rule 1.220 (d) (e) Florida Rules of Criminal Procedure	9

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Sam Nick Farinella, prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit entered July 7, 1970, and denial of Petition for Rehearing entered without opinion on August 10, 1970.

OPINIONS BELOW

The Judgment and Commitment as to Sam Nick Farinella was filed on August 16, 1967 (App. B) on Counts II and III of the Indictment. (App. A)

The decision of the United States Court of Appeals for the Fifth Circuit was entered on January 13, 1969 (App. C). Petition for Rehearing was filed in January 1969 (App. D). It was denied on February 6, 1969 (App. E).

Certiorari was denied without opinion and reported in 394 U.S. 1000. Rehearing denied is reported in 395 U.S. 954.

Motion for New Trial and Supplemental Motion for New Trial, pursuant to Rule 33, Federal Rules of Criminal Procedure, were denied by the trial court. The United States Court of Appeals, Fifth Circuit, affirmed the decision (App. F) on July 7, 1970 and denied rehearing (App. G) on August 10, 1970.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S. Code Section 1254(1). Jurisdiction of this Court is also invoked under Rule 19(1)(b) of the Rules of the Supreme Court of the United States adopted June 15, 1970, effective July 1, 1970, because a Court of Appeals has rendered a decision on an important question of federal law which has not been, but should be, settled by this Court. It is also contended that conflict jurisdiction is present on one question presented.

QUESTIONS PRESENTED

I

WHEN A CONVICTION OF A HOBBS ACT VIOLATION IS UPHELD BECAUSE TWO THOUSAND DOLLARS WERE ALLEGEDLY TAKEN FROM A BUSINESS ENGAGED IN INTERSTATE COMMERCE, AND WHEN NEWLY DISCOVERED EVIDENCE WOULD SHOW THAT THE TWO THOUSAND DOLLARS NEVER IN FACT EXISTED, IS AN EVIDENTIARY HEARING LEADING TO A NEW TRIAL WARRANTED?

II

SINCE THE FEDERAL RULES OF CRIMINAL PROCEDURE DO NOT INCLUDE THE RIGHT TO REVELATION OF GOVERNMENT TRIAL WITNESSES, IS THERE JUSTIFICATION FOR REFUSING TO CONSIDER AS GROUNDS FOR A NEW TRIAL THE FACT THAT TRIAL COUNSEL DID NOT VOIR DIRE THE JURY ON RELATIONSHIP WITH WITNESSES AND THUS DID NOT DISCOVER THE CLOSE RELATIONSHIP BETWEEN A GOVERNMENT WITNESS AND THE FOREMAN OF THE JURY?

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS INVOLVED

Title 28 U.S.C. Section 1254(1)

"By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

Rule 19(1)(b) Rules of Supreme Court of the United States

"Where a court of appeals has rendered a decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

18 U.S.C.A. 1951(a)(b)

"Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to

do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section —

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family, or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction."

Rule 33, Federal Rules of Criminal Procedure

NEW TRIAL

The court on motion of a defendant may grant a new trial to him if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

STATEMENT OF THE CASE

SAM NICK FARINELLA was found guilty on two counts of Hobbs Act violations (18 U.S.C.A. sec. 1951). He was acquitted on two other substantive counts and on a conspiracy count.

The judgment of conviction was affirmed. *U. S. v. Esperti*, 5 Cir. 1969, 406 F.2d. 148. Certiorari was denied. — U.S. —, 22 L.Ed.2d 777.

Motion and supplemental motion for new trial were filed. Affidavits in support of motion were also filed. An evidentiary hearing was sought. The hearing was denied as was the motion. An appeal and affirmance followed. The opinion of the court of appeals is appended as Appendix F. Rehearing was denied. (App. G)

The motions, for the purpose of this petition, were grounded on two points of fact.

1. The two thousand dollars allegedly taken from the company engaged in interstate commerce never existed.

2. The foreman of the trial jury and an important government witness, were very close business associates but no one was made aware of that relationship.

FEDERAL JURISDICTION

Federal jurisdiction in the first instance was based upon an alleged violation of the Hobbs Act, 18 U.S.C.A. 1951.

ARGUMENT

REASONS FOR GRANTING THE WRIT

I

WHEN A CONVICTION OF A HOBBS ACT VIOLATION IS UPHELD BECAUSE TWO THOUSAND DOLLARS WERE ALLEGEDLY TAKEN FROM A BUSINESS ENGAGED IN INTERSTATE COMMERCE, AND WHEN NEWLY DISCOVERED EVIDENCE WOULD SHOW THAT THE TWO THOUSAND DOLLARS NEVER IN FACT EXISTED, IS AN EVIDENTIARY HEARING LEADING TO A NEW TRIAL WARRANTED?

The Court of Appeals stated that an evidentiary hearing on a motion for new trial was not necessary. It also held that a new trial is not justified when the newly discovered evidence is merely cumulative or impeaching. We do not question that principle of law.

In this case, however, the evidence was not impeaching or cumulative. It is believed it required acquittal. It contradicted the original testimony in a manner not raised at the trial.

The testimony originally was concerned with whether or not two thousand dollars was taken from the company. The government said it was. The defendant denied the taking.

But no one ever denied that the two thousand dollars ever existed. The defendant couldn't since he would obviously have no way of knowing. The newly discovered evidence reached the very existence of two thousand dollars alleged to be taken and proved there never was any such money that petitioner could have taken.

The proferred testimony was by the very employee of the company who was alleged to have made the sale that created the income in cash to the company.

This evidence was not cumulative. If believed, it had to cause a different result.

At a minimum, the witness should have been examined at an evidentiary hearing in court.

The presentation of newly discovered evidence should be construed fairly to the accused and ambiguities should not be resolved in favor of the prosecution without inquiry of a proposed witness. See *Hamilton v. U. S.*, 140 F.2d. 679.

Here there was diligence by defendant; there is no contention that the information was not newly discovered; and it would probably produce a different verdict. *U. S. v. Johnson*, 142 F.2d. 588, Cert. dismissed 323 U.S. 806, 89 L.Ed. 643.

II

SINCE THE FEDERAL RULES OF CRIMINAL PROCEDURE DO NOT INCLUDE THE RIGHT TO REVELATION OF GOVERNMENT TRIAL WITNESSES, IS THERE JUSTIFICATION FOR REFUSING TO CONSIDER AS GROUNDS FOR A NEW TRIAL THE FACT THAT TRIAL COUNSEL DID NOT VOIR DIRE THE JURY ON RELATIONSHIP WITH WITNESSES AND THUS DID NOT DISCOVER THE CLOSE RELATIONSHIP BETWEEN A GOVERNMENT WITNESS AND THE FOREMAN OF THE JURY?

Rule 16 of the Federal Rules of Criminal Procedure does not encompass the right of a defendant to secure the names of prosecution witnesses. Many states have such provisions, i.e., the Florida Rules of Criminal Procedure include the right to secure the names of witnesses whose testimony lead to the filing of the information, or witnesses to be used at trial. Florida Rules of Criminal Procedure, Rule 1.220(d) (e).

Under such a procedure an attorney could and should inquire of prospective jurors concerning relationship with and knowledge of potential witnesses. Since he could inquire, he could hardly complain if lack of such inquiry created prejudice by the existence of an undiscovered relationship.

The lack of diligence is visited upon trial counsel here by the Court of Appeals although the power to make such inquiry does not exist.

> " . . . . . there is no representation by the appellants that they requested a list of prospective witnesses which would have enabled them to discover the relationship on voir dire. This alone would establish a lack of diligence which would militate against granting of new trial." *U.S. v. Farinella*, C.A. 5th 1970, July 7, 1970. (App. F.)

Trial by surprise is outmoded. The rules should possibly include the right to secure names that will be important at trial. But, certainly, until that happens, if later information unveils a relationship probably, or even possibly prejudicial, fairness would indicate the propriety of a new trial.

CONCLUSION

Petitioner respectfully urges the granting of the Petition for Writ of Certiorari.

Respectfully submitted,

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By_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three true and correct copies of the foregoing Petition for Writ of Certiorari were mailed to William G. Earle, Department of Justice, Criminal Division, Post Office Box 1070, Miami, Florida, 33101 and Fred M. Vinson, Jr., Assistant Attorney General, Criminal Division, this 8th day of September, 1970.